UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
Zaclon, Incorporated,	**)**	**Docket No. RCRA-05-2004-0019**
	)	
Respondent	**)**	

ORDER ON COMPLAINANT'S MOTIONS TO AMEND COMPLAINT AND TO SUPPLEMENT PREHEARING EXCHANGE AND ORDER RESCHEDULING THE HEARING

I. Background

The Complaint in this matter was filed on September 29, 2004, charging Respondent with a violation of the resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.* The Complaint alleges that Respondent owns and operates a facility at which hazardous waste was stored without a permit or interim status, in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a) and the state regulations implementing this provision, Ohio Administrative Code 3745-50-45.

An Answer to the Complaint was filed on November 2, 2004 by James B. Krimmel, President of Zaclon, LLC, asserting that Zaclon, Incorporated was reorganized into a parent company, Alpha Zeta Holdings, Inc., and two wholly owned subsidiaries, Independence Land Development Company and Zaclon LLC, and that the latter company is responsible for the chemical manufacturing activities on the site and thus is the respondent for the Complaint.

The Office of Administrative Law Judges offered Complainant, the Chief of the Enforcement and Compliance Assurance Branch of the Waste, Pesticides, and Toxic Substances Division of EPA Region 5 ("Complainant" or "EPA"), and Mr. Krimmel the opportunity to engage in Alternative Dispute Resolution (ADR), which they accepted, but the parties were not able to settle this matter in ADR. Before or during the ADR process, counsel entered his appearance on behalf of Respondent. The undersigned was designated to preside in this matter on May 24, 2005. By Order dated May 26, 2005, the parties were requested to file prehearing exchange information, and on July 21, 2005, the prehearing exchange was completed.

By Motion dated July 21, 2005, Complainant requested leave to amend its Rebuttal Prehearing Exchange to supply Complainant's counsel's signature and date of submittal which was inadvertently omitted from the Rebuttal Prehearing Exchange document. The Motion states

that Respondent has no objection thereto. For good cause, the Motion for Leave to Amend Complainant's Prehearing Exchange, dated July 21, 2005, will be granted.

The following motions are discussed and resolved herein below. On August 18, 2005, Complainant filed a Motion for Leave to Amend Complaint and Memorandum in Support (collectively, "First Motion to Amend"), with an attached "Complaint and Compliance Order, First Amended Complaint." In its First Motion to Amend, Complainant seeks to add Zaclon LLC and Independence Land Development Company ("ILDC") as respondents to the Complaint.

On September 16, 2005, Complainant filed a *Second* Motion to Amend Complaint and Memorandum in Support (collectively, "Second Motion to Amend"), with attachments including a "Complaint and Compliance Order, Second Amended Complaint." This Motion states that, based on new information which was received within the past few weeks from an inspection conducted at the facility, Complainant seeks to add allegations that Zaclon illegally receives, stores, and treats hazardous waste in violation of RCRA. On the same date, Complainant filed a Motion for Leave to Supplement Pre-Hearing Exchange, to add documents and witnesses necessary to provide the evidence to establish the veracity of the new allegations of violation in the Second Amended Complaint.

On September 30, 2005, a Response to the Second Motion to Amend Complaint and a Response to the Motion for Leave to Supplement the Pre-Hearing Exchange was submitted by Respondent

II. Standard for Motion to Amend Complaint

The Rules of Practice provide that "the complainant may amend the complaint only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.13(c). No standard is provided in the Rules, however, for determining whether to grant an amendment. The Federal Rules of Civil Procedure (FRCP) offer instructive guidance to motions to amend in administrative proceedings. *Port of Oaklnad and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 205 (EAB 1992). The general rule is that administrative pleadings are "liberally construed and easily amended." *Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992)(quoting *Yaffe Iron & Metal Co., Inc. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985)). The standard in Federal court for amendment of pleadings is set forth in *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) as follows: "[i]n the absence of . . . undue delay, bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party . . . [or] futility of amendment," leave to amend pleadings should be allowed. The most significant of these factors is whether the amendment would unduly prejudice the opposing party; such prejudice may result from need for additional discovery, delayed litigation, or presentation of new legal theories shortly before trial, with attendant legal costs and burdens to the opposing party, or burden to the court from protracted litigation which harms the other litigants who must wait longer in the court queue. *Carroll Oil Company*, RCRA (9006) App. 01-02, 2002 EPA App. LEXIS 14 * 37, 40- 42 (EAB, July 31, 2002)(ALJ did not abuse discretion in denying motion to amend complaint to add two parties, where motion was filed within motions deadline but only six weeks before the hearing, EPA had information which suggested the other parties may be potential respondents

months earlier, and information supporting amendment was not added to prehearing exchange until eleven days after motion to amend was filed). Matters of prejudice and avoidance of undue delay may constitute sufficient, independent reasons for denying an amendment to a complaint.[1] *Id.* n. 17.

III. Discussion of First Motion to Amend

Grounds stated for the First Motion to Amend are that the real property on which the facility at issue is located may be owned by ILDC and the industrial plant on the property is now operated by Zaclon LLC. Complainant asserts that Zaclon Incorporated operated the business at the time Complainant alleges the illegal storage of hazardous waste took place, and that while Zaclon Incorporated may have changed its name to ILDC, it still does business under the name Zaclon Incorporated. Complainant seeks to amend the Complaint to add ILDC and Zaclon LLC to ensure that the legal owner and legal operator of the facility at issue are properly named as respondents in this case. In the original Complaint as well as the proposed First Amended Complaint, Complainant proposes that a total civil penalty of $162,371.

No response to the First Motion to Amend was filed within the time provided by the Rules of Practice, 40 C.F.R. part 22. *See*, 40 C.F.R. §§ 22.7(c). 22.16(b). Respondent's failure to respond may be deemed as a waiver of any objection to the granting of the Motion to Amend under 40 C.F.R. § 22.16(b). Furthermore, documents filed by Respondent suggest that it concurs in the proposed amendment to add the other two respondents. Respondent's Initial Prehearing Exchange statement (at 6) asserts that "The chemical manufacturing facility at the site is owned and operated by Zaclon LLC, not Zaclon, Inc., and the land itself is owned by Independence Land Development Company, formerly known as Zaclon, Inc." In documents submitted in this proceeding from September 6, 2005 and thereafter, Respondent's counsel states that he is counsel for Zaclon, Incorporated, Zaclon LLC and ILDC and refers to these companies as "Respondents."

The hearing has been scheduled to commence on November 15, 2005. While Complainant certainly could have filed the First Motion to Amend motion earlier in the proceeding, the delay will not be considered to be fatal to the Motion in circumstances where documents in this proceeding filed by Respondent's counsel suggest concurrence with the proposed amendment, where the other two proposed respondents were brought to Complainant's attention in the Answer and had notice of their potential involvement in this matter since the Answer was filed, and where the motion was filed three months before the hearing is scheduled to commence. There is no indication of dilatory motive or bad faith on the part of Complainant. The addition of the purported owner and operator of the facility as respondents does not appear to be futile, as the statutory and regulatory requirements prohibiting storage of hazardous waste

[1] It is noted that Federal courts have held that mere delay is seldom a sufficient reason to deny a motion to amend. *Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir. 1973); *United States v Pend Orielle Public Utility District No. 1*, 926 F.2d 1502, 1511 (9th Cir. 1991)(the crucial factor is not the length of the delay but whether prejudice would result).

without a RCRA permit apply to "each person owning or operating an existing facility . . . for the . . . storage . . . of hazardous waste." RCRA § 3005(a), 42 U.S.C. § 6925(a).

Accordingly, the Complainant is granted authority to amend the Complaint to add Zaclon LLC and ILDC as respondents in this matter.[2]

IV. Discussion of Second Motion to Amend and Motion to Supplement Prehearing Exchange

In its Second Motion to Amend, Complainant asserts that on August 10 through 12, 2005, representatives of the Ohio Environmental Protection Agency (OEPA) conducted an inspection of the facility and asked EPA to amend the Complaint to add allegations that Respondents illegally receive, store and treat hazardous waste. Specifically, Complainant asserts that Zaclon receives shipments of spent stripping acid as a "secondary material" from other companies, that Zaclon uses it as an ingredient for manufacturing specialty chemicals (primarily zinc ammonium chloride), that Zaclon must reclaim the spent stripping acid by treatment to remove contaminants before a useful product can be manufactured and is therefore a solid waste, and that the spent stripping acid exhibits the hazardous characteristic of corrosivity and contains lead and cadmium and is therefore a hazardous waste. Complainant alleges in proposed Count 2 that Respondents thereby receive, treat and store hazardous waste without a RCRA permit or interim status, which is a violation of Section 3005(a) of RCRA and OAC 3745-50-45 [40 C.F.R. Part 270].

Complainant argues that in the interest of judicial economy and to conserve the parties' resources, Complainant seeks to amend the Complaint to add a new count of violation rather than pursue a separate complaint based on the new allegations. Complainant seeks a penalty of $231,772 for the new Count 2, which would increase the total proposed penalty to $394,143. Attached to the Second Motion to Amend are the Second Amended Complaint, a Penalty Calculation Worksheet for Count 2, a Narrative to Support Penalty (for Count 2), and what appears to be a printout of a calculation of Respondents' "economic benefit of noncompliance" through the BEN computer model.

In support of the proposed new count of violation, Complainant seeks to add to its Prehearing Exchange a Field Report on the inspection of Respondents' facility conducted by OEPA on August 10-12, 2005 (proposed Exhibit 19), correspondence and memoranda from OEPA in 1994 regarding Zaclon's use of spent stripping acid (proposed Exhibits 20A, 20B AND 20C), and materials submitted by Zaclon to OEPA in 1994 as to whether Zaclon could accept and store spent stripping acid without RCRA manifests, permit or interim status (proposed Exhibit 21). Complainant seeks to add as a witness Ms. Karen Nesbit of OEPA, who allegedly conducted the most recent inspection of Respondents' facility and wrote the Inspection Report, to be available for cross examination and for testimony if necessary.

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[2] Accordingly, this Order hereinafter uses the term "Respondents" or "Zaclon" to refer to Zaclon Inc., Zaclon LLC, and ILDC collectively.

In their Response, Respondents "vehemently object" to the motions to amend and to supplement Complainant's Prehearing Exchange. First, Respondents argue that an amendment to the Complaint less than two months prior to the hearing is highly prejudicial because it does not allow adequate time to prepare a defense against the new allegations. Respondents assert that prior to service of the Second Motion to Amend and Motion to Supplement, they had never seen the 37-page inspection report, which contains "many detailed and highly technical issues, involving a long history at the facility." Response at 2.

Second, Respondents assert that the amendment would ultimately prove futile because EPA's assertion that the stripping acid is a hazardous waste contradicts what the OEPA represented in a letter dated December 23, 1994, (Complainant's proposed Prehearing Exchange Exhibit 20C), which states that it is not a hazardous waste, and what Respondents have relied upon for about eleven years. Response at 2. Respondents therefore state that they will immediately file a motion to dismiss proposed Count 2 if the Second Motion to Amend is granted.

Third, Respondents assert that by adding proposed Count 2, EPA is attempting to attack Respondents' defense to Count 1. The Complaint alleges in Count 1 that Respondents stored sash and baghouse dust in a manner that constitutes disposal, and accumulated it speculatively for at least 6 years before being recycled, and that Respondents thereby stored hazardous waste without a permit or interim status. The Federal regulations at 40 C.F.R. § 261.2 provide that materials are solid wastes if they are recycled but are "used in a manner constituting disposal" or "accumulated speculatively." The regulations at 40 C.F.R. § 261.1(c)(8) provide that a material is not "accumulated speculatively" if it is shown that the material is potentially recyclable, has a feasible means of being recycled, and that during the calendar year the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75 percent by weight or volume of the amount of that material accumulated at the beginning of the period. Such material must be "of the same type" and "recycled in the same way." 40 C.F.R. § 261.1(c)(8). Respondents claim that the amount of material that is recycled is at least 75% of the amount accumulated at the beginning of the year, and that sash, baghouse dust, stripping acid and spent preflux are all primary raw materials generated in the same galvanizing process, and thus the "same type," and are recycled in the same way (for manufacture of zinc ammonium chloride). Respondents' position as to Count 1 is that the stripping acid is not a "waste," and that OEPA had informed Respondents that it was not a "waste," eleven years ago. In the Second Motion to Amend, Complainant proposes to allege in Count 2 that the stripping acid is a hazardous waste. Thus, Respondents argue that this proposal is EPA's attempt to undercut Respondents' position.

Respondents, however, do not oppose the granting of the Second Motion to Amend, recognizing that if the motion is denied EPA will simply file a separate complaint, which would add burdens and transactional costs to Respondents. If the motion is granted, Respondents request a motion for a six month postponement of the hearing. Respondents point out that they need time to answer the amended complaint and "exhaustively search all records" in order to supplement their own pre-hearing exchange, and if the motion to dismiss is not granted, to prepare a substantive defense before a hearing. Motion at 3.

It appears that Respondents disagree with an amendment to the complaint which would

substantially expand the scope of the hearing, on the basis that such amendment would prejudice the Respondents, but they would not oppose the motion to amend if the hearing is postponed. Nevertheless, the factors under *Foman* will be considered in ruling on the motion.

The Second Motion to Amend was filed about a month after the inspection on August 10-12, which is not an undue delay from the date of the inspection. Respondents indicate that the inspection was a response to Zaclon's defenses to Count 1 of the Complaint. The information in Zaclon's Prehearing Exchange presented further information on Respondents' defenses, and the inspection occurred only a few weeks after the Prehearing Exchange was filed. Therefore, there does not appear to be undue delay on the part of Complainant. There is also no bad faith or dilatory motive apparent on the part of Complainant.

It cannot be determined at this point in the proceeding that the proposed amendment would be futile. Respondents rely on correspondence from the OEPA to support their position that the stripping acid is not a waste, but the facts, evidence and arguments relevant to EPA's proposed Count 2 have not yet been sufficiently developed by both parties to determine whether the stripping acid at the facility on the dates of the inspection is or is not a waste under the applicable regulations.

The allegations of proposed Count 2 are related to the facts alleged as to Count 1, so efficiency and judicial economy would be better served by allowing the Complaint to be amended rather than by EPA filing a second Complaint. However, as pointed out by Respondents, they likely would suffer undue prejudice from having to defend against the new allegations and prepare for a hearing which is only six weeks away. The time remaining before the hearing is insufficient for Respondents to file an answer to an amended complaint and supplement their Prehearing Exchange in response to the proposed new allegations, for the additional motions and responses which are likely to be filed by the parties, and for rulings thereon to be issued. Such prejudice may be decreased or eliminated by a postponement of the hearing.

Accordingly, Complainant's Second Motion to Amend and its Motion for Leave to Supplement the Prehearing Exchange will be granted, along with a postponement of the hearing. Along with the rescheduling of the hearing, the due dates for certain prehearing documents set forth in the July 25, 2005 Order Scheduling Hearing are also rescheduled, as set forth below.

V. ORDER

1. Complainant's Motion for Leave to Amend Complainant's Prehearing Exchange, dated July 21, 2005, is hereby **GRANTED.**

2. Complainant's Motion to Leave to Amend Complaint, dated August 18, 2005, is hereby **GRANTED**.

3. Complainant's Second Motion to Amend Complaint, dated September 16, 2005, is hereby **GRANTED.** Complainant shall file and serve on Respondents the proposed Second

Amended Complaint attached to the Motion, within seven days of the date of this Order.

4. Respondents shall file an answer to the Second Amended Complaint within twenty days of the date of service of the Second Amended Complaint on the Respondents.

5. Complainant's Motion for Leave to Supplement Prehearing Exchange, dated September 16, 2005, is hereby **GRANTED.**

6. The hearing scheduled to commence on November 15, 2005 is hereby **RESCHEDULED** to commence in Cleveland, Ohio beginning promptly at **9:30 a.m.** on Tuesday, **May 16, 2006**, continuing if necessary, on May 17-19, 2006. The Regional Hearing Clerk will make appropriate arrangements for a courtroom. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

7. The parties are directed to hold another settlement conference on or before **November 25, 2005,** and attempt to reach an amicable resolution of this matter. The Complainant shall file a status report regarding such conference and the status of settlement on or before **December 2, 2005.**

8. Respondents shall file on **December 9, 2005** a supplement to their Prehearing Exchange, including and direct and/or rebuttal evidence, with respect to Count 2 of the Second Amended Complaint, and including information in response to Paragraphs 1(A), 1(B), 3(F) and 3(G) of the May 26, 2005 Prehearing Order as to Count 2. Complainant shall file any rebuttal to Respondents' supplement to their Prehearing Exchange on or before **December 21, 2005.**

9. All dispositive motions as to liability for Count 2 of the Second Amended Complaint, such as motion for accelerated decision or motion to dismiss under 40 C.F.R. 22.20(a) shall be filed on or before **January 20, 2006.**

10. All other prehearing motions, such as motions to amend and motions in limine, must be filed on or before **February 24, 2006.**

11. On or before **March 24, 2006**, the parties shall file a Joint Set of Stipulated Facts, Exhibits and Testimony as a supplement to the Joint Stipulations as to Facts and Exhibits filed on August 31, 2005.

12. The parties may, if they wish, file prehearing briefs. The deadline for filing such briefs is **April 14, 2006.** The Complainant's brief should state each element of each claim of violation, and state which elements are to be tried at the hearing and which elements are not. The Respondents' brief should identify each of the defenses the Respondents intend to pursue at the hearing.

Individuals requiring special accommodations at the hearing, including wheelchair access, should contact the Regional Hearing Clerk, as soon as possible so that appropriate arrangements can be made.

THE RESPONDENT IS HEREBY ADVISED THAT FAILURE TO APPEAR AT THE HEARING, WITHOUT GOOD CAUSE BEING SHOWN THEREFOR, MAY RESULT IN A DEFAULT JUDGMENT BEING ENTERED AGAINST IT.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

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Susan L. Biro
Chief Administrative Law Judge

Date: October 7, 2005
Washington, D.C